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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JESUS CARRASCO et al.,

Plaintiffs and Respondents,

v.

STEVE TSEHERIDIS,

Defendant and Appellant.

E045380

(Super.Ct.No. SCVSS139225)

OPINION

STEVE TSEHERIDIS,

Plaintiff and Appellant,

v.

JESUS CARRASCO et al.,

Defendants and Respondents.

E045380

(Super.Ct.No. UDFS000140)

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,
Judge. Affirmed.

O'Connell & Rydstrom and Richard I. Rydstrom for Defendant and Appellant.

Law Offices of George A. Saba and George A. Saba for Plaintiffs and Respondents.

Defendant Steve Tseheridis (defendant) appeals from judgment entered after the jury returned special verdicts in favor of plaintiffs Jesus Carrasco and Gloria Carrasco (plaintiffs) on causes of action for misrepresentation and defamation. The jury also rejected defendant's consolidated unlawful detainer action.

Defendant contends there was insufficient evidence to support the misrepresentation liability and damages verdicts. Defendant also contends plaintiffs introduced improper, inflammatory evidence, and the special verdicts were internally inconsistent. In addition, defendant contends the jury improperly redeliberated and used voting tallies during polling, and was confused by the lengthy special verdict form.

We reject defendant's contentions and affirm the judgment.

1. Factual and Procedural Background

After defendant's real estate agent, Robert Albrecht, notified Gloria that the person who was going to purchase defendant's restaurant withdrew his offer, plaintiffs met with Albrecht and defendant to discuss leasing and possibly purchasing the restaurant. The property included a restaurant, bar, banquet room, and dance floor.

Plaintiffs, defendant, and Albrecht met again on April 11, 2006, to sign a lease of defendant's restaurant. When they arrived at the restaurant property before signing the lease, plaintiffs noticed a California Department of Alcoholic Beverage Control (ABC) sign posted outside, above the restaurant door, advising the public that Robert Hernandez had applied for the liquor license to be transferred to him. Albrecht removed the sign and

gave it to defendant, who crumpled it up and put it in his car. Gloria asked defendant about the sign. Defendant told Gloria “not to worry about that, that he had taken care of that problem.” Plaintiffs and defendant then went inside the restaurant and signed the lease agreement.

Pursuant to the lease agreement (lease), defendant agreed to lease his restaurant property to plaintiffs for a term of 60 months, conditional upon plaintiffs purchasing the liquor license for \$30,000. The lease also provided an option to purchase the property at any time during the first year of the lease.

On April 12, 2006, Albrecht and defendant signed a document requesting the ABC to withdraw Hernandez’s liquor license application filed on February 22, 2006. Hernandez did not sign the withdrawal request. On April 17, 2006, the ABC sent Hernandez a letter notifying him that his application would be withdrawn in 10 days. He did not respond.

On April 17, 2006, Gloria notified defendant that plaintiffs wished to exercise their option to purchase the property. On that same day, Gloria and defendant purportedly prepared a memorandum written in Spanish (purchase memo), which defendant signed, memorializing Gloria and defendant’s oral agreement that plaintiffs would purchase the property. Forensic expert, Kurt Kuhn, testified on behalf of defendant that defendant’s signature on the purchase memo was a machine manipulated forgery created by photocopying and scanning the signature onto the document.

On April 26, 2006, defendant gave plaintiffs the keys to the property and told them rent would begin June 1, 2006. Upon receiving the keys, Gloria gave defendant two

checks, each for \$12,000, for the June rent and for the last month's rent. One of the checks was made out to defendant. Gloria wrote on the check, "the last month rent." At defendant's request, Gloria made the other check out to Albrecht to pay for his commission. She wrote on Albrecht's check, "rent on 630."¹ Gloria told defendant that if there was any problem getting the liquor license, defendant must return the money. Defendant replied that if he could not get the liquor license, plaintiffs did not have to pay any rent. Gloria testified that she paid the June rent because, when she wrote the check, she did not know there would be a problem getting the liquor license.

Verna Joseph of the ABC testified that, upon expiration on April 27, 2006, of the 10-day period for Hernandez to respond to ABC's notice of withdrawal of his liquor license application, the liquor license became available for transfer to plaintiffs.

On May 2, 2006, plaintiffs and defendant opened escrow for plaintiffs' purchase of the liquor license. Plaintiffs deposited in escrow \$5,000 toward the purchase of the liquor license. The date of sale of the license and the close of escrow were to occur on June 16.

Also on May 2, plaintiffs and defendant signed a notice for transfer of the liquor license to plaintiffs. The notice was published. Plaintiffs paid the transfer fee of \$2,086 but the ABC did not cash plaintiffs' check. The ABC called Gloria and told her to pick up the transfer application and check because the ABC could not process it since there was another application pending on the same liquor license. Gloria took the application

¹ The property address is 630 West Foothill Boulevard in Rialto.

to defendant who told her he would take care of it and that she did not have to pay the rent until he obtained the liquor license.

Plaintiffs returned to the ABC with defendant two more times. Plaintiffs were unable to obtain the liquor license both times. Plaintiffs retained an attorney to assist in getting the liquor license, to no avail. The liquor license was never transferred to plaintiffs.

Meanwhile, plaintiffs obtained various required business permits and made repairs to the premises. Defendant said he would reimburse plaintiffs for the cost of the repairs, but he never did.

On June 2, plaintiffs opened their restaurant, which included banquet rooms. Potential customers inquired about using the banquet rooms but left when plaintiffs told them they did not have a liquor license. In order to sell alcohol at banquets held at the restaurant, Gloria had to hire Robert Hernandez, who had a liquor license, to serve alcohol. Plaintiffs did not receive any income from the alcohol Hernandez sold.

On June 21, Gloria wrote a check for \$12,000, for the July rent. Gloria left the check on her desk because she first wanted to consult with her attorney regarding the status of the liquor license. When Gloria discovered someone had given the check to defendant, she then called her bank and ordered a stop payment on the check because plaintiffs still did not have a liquor license. Defendant was furious at Gloria for cancelling the July rent check.

On June 27, 2006, defendant served plaintiffs with a notice to pay the June rent or quit. The notice stated plaintiffs owed \$12,000 in rent for June 2006.

On June 30, 2006, plaintiffs filed a complaint against defendant, and later filed an amended complaint and a second amended complaint. Plaintiffs' second amended complaint (complaint) contains 12 causes of action, including causes of action for breach of contract, fraud, and defamation. Plaintiffs dismissed several causes of action before trial (specific performance and declaratory relief) and withdrew numerous other causes of action during the trial.

On July 3, 2006, defendant filed an unlawful detainer action against plaintiffs. Defendant alleged that plaintiffs breached the lease by failing to pay the June 2006 rent in the amount of \$12,000. The trial court ordered consolidated plaintiffs' complaint and defendant's unlawful detainer action.

On September 28, 2006, plaintiffs filed another application for transfer of the liquor license to plaintiffs. According to Gloria, plaintiffs provided the ABC with all the information requested by the ABC but the application was rejected because there was another application pending.

Joseph of the ABC testified that there were no "holds" on the liquor license between April 27, 2006, and September 28, 2006, which would have prevented transfer of the license to plaintiffs. The computer showed that when plaintiffs filed for the license on September 28, the Hernandez's application had been withdrawn. Joseph was not assigned to the case before September 28, so she could not be certain that plaintiffs had not previously attempted to apply for the license.

On October 31, 2006, Gloria called defendant and told him plaintiffs were abandoning the property.

Meanwhile, after receiving the application in September, Joseph sent plaintiffs a letter requesting certain information. On November 27, 2006, plaintiffs came in and Joseph told them she needed additional forms filled out. Plaintiffs said they would do so but never did. Joseph never heard from them again.

The trial court ordered that liability be tried separately, before trial on the damages.

The jury entered special verdicts finding defendant liable for misrepresentation and defamation. The jury rejected defendant's unlawful detainer action. The jury returned defense verdicts on plaintiffs' breach of contract cause of action, finding that defendant's duty to perform (transferring the liquor license) was conditional upon the plaintiffs performance of ABC requirements, and plaintiffs did not perform all the requirements. The jury also found there was insufficient evidence to support liability for intentional infliction of emotional distress, concealment, and false promise.

During a bifurcated trial on damages, the jury awarded plaintiffs \$75,000 in damages for intentional misrepresentation, with no damages for defamation.

2. Sufficiency of Evidence of Intentional Misrepresentation

Defendant contends there was insufficient evidence to support liability for intentional misrepresentation because there was no evidence defendant made a false statement.

We review the trial court's liability finding under the substantial evidence standard. Under this standard, we must determine whether there was substantial evidence, contradicted or uncontradicted, to support the jury's findings below.

(*Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 836.) We must “view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.” [Citation.]” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, quoting *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) Here, there is substantial evidence supporting the intentional misrepresentation verdict against defendant.

The following elements must be proved to prevail on a cause of action for intentional misrepresentation: (1) a misrepresentation of a material fact; (2) knowledge of falsity; (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damages. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481 (*Atascadero*).)

During the trial, plaintiffs presented evidence and argued that defendant intentionally misrepresented to them that he had already taken care of the transfer of the liquor license to Hernandez, whereas this was false. Plaintiffs established that defendant did not request ABC to withdraw Hernandez’s liquor license application until the day after plaintiffs signed the lease agreement.

Defendant contends he did not make any false statements to plaintiffs because the lease did not require the liquor license to be available when the lease was executed on April 11, 2006. Citing the purchase option provision, defendant argues the lease did not have to be available until 90 days from plaintiffs’ exercise of the purchase option or until

the June escrow closing date. Furthermore, Joseph of the ABC testified the liquor license was available for transfer as of April 27, 2006.

The 90-day provision defendant cites (paragraph 32 of the lease) has nothing to do with when the liquor license had to be available for transfer under the lease agreement. The provision concerns the option to purchase the property, not the liquor license.

The June 16, 2006, date defendant relies on also is not dispositive. It is contained in the May 2, 2006, escrow instructions for plaintiffs' purchase of the liquor license. Certainly, the liquor license had to be available by the time escrow closed, but this does not establish whether the liquor license had to be available for transfer when defendant indicated on April 11 that the license was available to transfer to plaintiffs. There was undisputed evidence that the liquor license was not available at that time, and defendant knew it but did not want to disclose this to plaintiffs because they might not sign the lease. The liquor license was critical to the profitability of plaintiffs' restaurant business.

The day after plaintiffs signed the lease, defendant attempted to resolve the liquor license problem by requesting the ABC to withdraw Hernandez's liquor license application. It is undisputed the license was not available for transfer to plaintiffs until April 27, 2006, 10 days after the ABC sent notice to Hernandez of defendant's request to withdraw Hernandez's application for the liquor license. Gloria testified the liquor license remained unavailable for transfer to plaintiffs in September 2006.

Regardless of whether under the lease the liquor license had to be available for transfer when plaintiffs entered into the lease, and even assuming it was available as soon as April 27, 2006, there nevertheless was substantial evidence that defendant made an

intentional misrepresentation to plaintiffs on April 11, 2006, inducing plaintiffs to enter into the lease. Defendant falsely stated that the problem of Hernandez previously applying for the license had already been taken care of and therefore there would be no problem transferring the license to plaintiffs. There was also ample evidence that defendant had knowledge of the falsity of that representation; defendant intended to deceive plaintiffs and induce them to rely on the misrepresentation; plaintiffs justifiably relied on the misrepresentation; and plaintiffs incurred resulting damages, as discussed below. (*Atascadero, supra*, 68 Cal.App.4th at p. 481.)

Defendant's contention that his signature on the purchase memo was forged is irrelevant to intentional misrepresentation liability. The purchase memo concerns plaintiffs' exercise on April 17 of the lease option to purchase the property. The purchase memo has no bearing on whether defendant falsely represented on April 11 that defendant had already taken care of the problem regarding transferring the liquor license to Hernandez.

3. Damages

During the bifurcated trial on damages, the jury awarded plaintiffs \$75,000 in damages for intentional misrepresentation, and no damages for defamation. The special verdict states the \$75,000 damages award consisted of \$16,000 in past economic loss, including lost earnings and profits; \$56,000 in future economic loss, including lost earnings, lost profits, and lost earning capacity; \$1,500 in past noneconomic loss, including physical pain; and \$1,500 in future noneconomic loss, including physical pain.

Defendant challenges the damages award on the grounds the special verdict entered during the liability phase of the trial states the jury found that (1) defendant did all that was required to transfer the liquor license; (2) the license was available; and (3) the conditions triggering defendant's duty to make available the liquor license for transfer did not occur.

These findings were on the breach of contract claim and are irrelevant to plaintiffs' intentional misrepresentation claim, which does not concern whether defendant acted properly in attempting to transfer the liquor license. The intentional misrepresentation claim concerns defendant making a false statement inducing plaintiffs to enter into the lease. The damages consist of plaintiffs' losses incurred in attempting to operate a profitable business which plaintiffs would not have attempted had they not been induced into leasing the restaurant property. Plaintiffs provided sufficient evidence establishing at least \$75,000 in such losses. Gloria testified during the damages phase that an accountant prepared profit and loss statements for plaintiffs' business. The profit and loss statements showed plaintiffs' business lost \$80,657.59 from April 26, 2006, through July 31, 2006. During the month of August, the business lost \$31,149.72.

Gloria also testified that customers had signed contracts for use of plaintiffs' banquet facilities, and some of those customers cancelled their contracts because there was no liquor license. Plaintiffs lost \$67,427.63 in profits due to customers cancelling their contracts because the liquor license was not transferred to plaintiffs. Plaintiffs also spent \$17,068 on restaurant improvements and \$17,041.36 on repairs.

Defendant argues plaintiffs did not mitigate their damages since they could have avoided contract cancellations by retaining Hernandez to sell alcohol at the restaurant. But Gloria testified Hernandez would not sell alcohol at plaintiffs' restaurant unless plaintiffs' customers agreed to an open bar and he received the entire profits. Plaintiffs were entitled to recover any damages or losses arising out of operating their restaurant, since they would not have entered into the restaurant lease had they known there was a pending application for transfer of the liquor license to Hernandez.

Defendant complains that the special jury instructions and special verdict include damages for physical pain, whereas the trial court ruled there would be no personal injury damages because the case was not a personal injury case. Defendant forfeited this issue by not raising the objection in the trial court. Generally, an appellant forfeits claims of error through inaction that prevents the trial court from avoiding or curing the error. (*Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1117.) This general waiver or forfeiture rule is "grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. [Citations.]" (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 629.)

4. Heart Attack Testimony

Defendant contends that during the damages phase of the trial, Jesus provided irrelevant, inflammatory testimony that stress from his deposition caused Jesus to have a heart attack. The trial court ultimately sustained defendant's objection to the testimony and ordered the testimony stricken. The court denied, as unnecessary, defendant's request for a limiting, corrective or remedial instruction.

This court reviews the trial court's rulings as to the admissibility of evidence for abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639.) "This standard of review applies to a trial court's determination of the relevance of evidence, as well as to whether the evidence's probative value is substantially outweighed by its prejudicial effect." (*Ibid.*)

A. Background Facts

During the damages phase of the trial, Jesus testified that he experienced a lot of stress from problems with the lease and liquor license. When plaintiffs' attorney asked him if he suffered heart attacks because of stress, defense counsel objected on relevancy grounds and on a lack of foundation. Plaintiffs' attorney stated that it was relevant to prove medical damages. The court overruled the objection. Jesus testified he had his third heart attack at his home, after his six-hour deposition in this case in August 2007.

Defense counsel objected again on relevancy grounds. In camera, the court noted the trial concerned damages for defamation and intentional misrepresentation, and punitive damages. It was not a personal injury case. Plaintiffs' attorney responded he intended to establish plaintiffs incurred medical expenses as a result of Jesus's stress. The court stated that plaintiffs had to have a doctor establish a foundation to link the stress and Jesus's heart attack. There also had to be proof of some connection between defendant's conduct and Jesus's heart attack. The court added that plaintiffs could testify as to how the defamation affected their personal life, stress level, and feelings of shame, mortification, and hurt feelings.

The court sustained defendant's objection to the heart attack evidence but denied defense counsel's request for a limiting instruction stating the jury was not to rely on the heart attack evidence as a basis for damages. Jesus then testified he became depressed because he had heard defendant was maligning plaintiffs, and people no longer believed plaintiffs. During cross-examination, defense counsel asked Jesus if he was unemployed due to medical problems, and Jesus said he was. His medical problems became worse because of defendant.

During cross-examination, Jesus stated he was not feeling well. Plaintiffs' attorney told the court he believed Jesus was having heart problems. Jesus said he was. Plaintiffs attorney asked the court to call 911. The court said it would take a break in the proceedings. Jesus was not called back to testify.

B. Discussion

Defendant argues that the heart attack testimony was inadmissible because there was no medical evidence linking Jesus's heart attack with his deposition, and the evidence was irrelevant because personal injury damages, including medical damages and damages for physical pain, were not recoverable. Defendant asserts that prejudice caused by the testimony was compounded by Jesus informing the court he believed he was having a heart attack on the witness stand.

Damages for intentional misrepresentation may include compensation for mental distress and suffering. (*Sprague v. Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal.App.3d 412, 417.) As to defamation damages, the trial court appropriately instructed the jury that plaintiffs could recover damages for shame, mortification, or hurt feelings.

The special verdict for intentional misrepresentation damages states that the jury awarded plaintiffs, not only economic damages, but also damages for past and future noneconomic losses, “including physical pain.”

The trial court did not abuse its discretion in initially allowing Jesus’s heart attack testimony on the ground it was relevant to proving medical damages arising from stress. When it became apparent plaintiffs could not establish a link between Jesus’s heart attacks, stress, and defendant’s acts, the court appropriately sustained defendant’s subsequent objections to Jesus’s heart attack evidence and ordered the testimony stricken.

There also was no abuse of discretion in not giving a limiting instruction after Jesus indicated he thought he might be having a heart attack since the court had already ordered his heart attack testimony stricken. It was unlikely an instruction would have made any difference or benefited defendant, since it would have emphasized the heart attack evidence.

Even if the trial court erred in allowing the evidence and denying a limiting instruction, this did not constitute prejudicial error. The judgment will not be reversed since it is not reasonably probable “that in the absence of the error, a result more favorable to the appealing party would have been reached.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570-571, 574 (*Soule*.)

There was no prejudice as to liability since the heart attack testimony occurred after the jury returned its special verdicts on liability. There was also no prejudice as to the award of economic damages since there was ample evidence supporting them. As to the \$3,000 in noneconomic damages, it also was not reasonably probable the damages

verdict would have been any different. Damages were only awarded as to intentional misrepresentation, and Jesus provided testimony that he suffered depression and stress from defendant's acts related to the lease and liquor license. Gloria's testimony indicated she felt humiliated due to customers cancelling their contracts with plaintiffs because they thought she was a fraud and a liar. Furthermore, by sustaining defendant's objections and ordering the heart attack testimony stricken, the court made it clear that the jury should not rely on the evidence as a basis for damages.

As to Jesus's statement he believed he was suffering a heart attack on the witness stand, there was no evidence this was feigned and the jury could reasonably infer the incident was simply due to the stress of testifying. Even if the trial court abused its discretion in initially allowing the heart attack evidence to establish noneconomic damages, admission of the evidence did not constitute a miscarriage of justice (Evid. Code, § 353) or prejudicial error.

5. Testimony by Henry Aguila and Gloria Carrasco

Defendant contends Henry Aguila and Gloria Carrasco provided inadmissible, prejudicial testimony. Aguila testified on behalf of plaintiffs. His investment company unsuccessfully attempted to purchase the restaurant property and liquor license in December 2005. In January or February 2006, defendant introduced Gloria to Aguila. Aguila had two lawsuits against defendant.

During the liability phase of the trial, Aguila testified that defendant had said he was going to ruin plaintiffs financially. Defense counsel objected on hearsay grounds. Without ruling on the objection, the trial court stated that defendant was a party. When

plaintiffs' attorney then asked Aguila what defendant told him, the court belatedly said the previous objection was overruled. Aguila testified that defendant told him he was "going to break me like he broke the Carrascos, and then him and his attorneys were going to spend the shit out of my money in litigation." Defense counsel objected on the ground Aguila's response exceeded the scope of testimony the trial court had intended to permit. The trial court agreed, sustained the objection, and struck the response.

Defendant also objects to Gloria's testimony made in response to plaintiffs' attorney asking if defendant was angry when Gloria stopped payment on her July rent check. Gloria testified that defendant was very angry and insulted her. Defense counsel objected. Before the court could respond, Gloria added, "He called me a stupid Mexican" and said, "you don't know who you're getting involved with." The court stated that everything after Gloria stated defendant was very angry, would be stricken as nonresponsive. When plaintiffs' attorney again asked Gloria what defendant told her, she testified that defendant was very influential and had a lot of money. He was going to take her to court and make her lose all her money and ruin her business. When plaintiffs' attorney asked if defendant called her names, she said, no. Plaintiffs' counsel asked if he called her a stupid Mexican. The court sustained defense counsel's objection on the ground the question was leading. Gloria said defendant insulted her some more.

Defendant argues that the statements made by Aguila and Gloria were extremely inflammatory and prejudicial. While we agree some of the statements were inflammatory, they do not constitute reversible error. The trial court ultimately sustained defendant's objections and ordered the statements stricken.

Furthermore, there was overwhelming evidence supporting the jury's liability and damages verdicts. It is not reasonably probable the defendant would have obtained a more favorable outcome had the testimony not occurred. Even in the absence of the stricken testimony, Gloria provided admissible testimony that defendant had repeatedly insulted her and had threatened to take her to court, cause her to lose all her money, and ruin her business. Here, we cannot say that the erroneous admission of Aguila and Gloria's testimony resulted in a miscarriage of justice or prejudicial error. (*Soule, supra*, 8 Cal.4th at pp. 570-571, 574; Evid. Code, § 353, Code Civ. Proc., § 475.)

6. Inconsistent Special Verdicts

Defendant asserts that the special verdicts are inconsistent, requiring reversal. We disagree.

In a special verdict, the jury finds the facts only, leaving the judgment to the court. (Code Civ. Proc., § 624.) “While the trial court has the power to interpret the verdict, nevertheless where the verdict is still ambiguous, hopelessly inconsistent or incomprehensible, reversal is required. [Citation.]” (*Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 758-759 (*Tri-Delta*).) Reversal, however, is required only when the verdict “cannot be reconciled in accordance with any theory of law.” (*Id.* at p. 759.) As stated in *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, “The first principle of inconsistent general and special verdicts is that they must be harmonized if there is any ‘possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have

drawn them.’ [Citation.]” (*Id.* at p. 1183.) Here, the special verdict findings are reconcilable.

Defendant complains the breach of contract verdict contradicts the unlawful detainer verdict because the breach of contract verdict states that all conditions required to trigger defendant’s performance under the lease agreement did not occur, whereas the jury found as to the unlawful detainer action that defendant breached the lease. These findings are reconcilable. The breach of contract verdict indicates the jury concluded defendant was not liable for breach of contract because plaintiffs had not fully performed all conditions required for defendant to perform under the lease. Most likely such findings were founded on defendant’s failure to transfer the liquor license to plaintiffs. While there was a breach or noncompliance with the lease, defendant’s nonperformance was excused because of plaintiffs’ nonperformance. Therefore the jury’s finding with regard to defendant’s unlawful detainer claim that defendant breached a contract term is reconcilable with the jury’s finding of nonliability for breach of contract.

In addition, the jury could have also reasonably concluded defendant breached some other lease term, such as in regards to plaintiffs exercising the option to purchase the property. Under such circumstances, the unlawful detainer and breach of contract verdict findings are reconcilable.

Even if there is inconsistency between the breach of contract and unlawful detainer verdicts, this does not require reversal because the jury found nonliability as to breach of contract, and there is overwhelming evidence supporting the jury’s rejection of defendant’s unlawful detainer action, since plaintiffs paid the June rent.

Defendant argues the jury's special verdict finding regarding defendant's affirmative defense on the breach of contract claim precluded the jury from finding defendant made a false statement. The special verdict finding on defendant's breach of contract affirmative defense states that plaintiffs failed to perform fully all of the ABC requirements necessary for transfer of the liquor license. As explained above, the fact that defendant did not have a duty to transfer the liquor license to plaintiffs because plaintiffs had not completed all of the ABC requirements for transfer is irrelevant to plaintiffs' intentional misrepresentation cause of action.

Defendant further asserts the following special verdict findings are inconsistent:

VF-1901. Concealment

"2. Did [defendant] intend to deceive [plaintiffs] by concealing the fact? No."

VF-1902. False Promise

"1. Did [defendant] make a promise to [plaintiffs] that was important to the transaction?

Yes."

VF-1702. Defamation per se (Private Figure-Matter of Public Concern)

"ACTUAL DAMAGES

6. Was [defendant's] conduct a substantial factor in causing [plaintiffs] actual harm?

No."

"ASSUMED DAMAGES TO REPUTATION

8. Did [plaintiffs] prove by clear and convincing evidence that [defendant] knew the statement was false or had serious doubts about the truth of the statement? No."

These special verdict findings are reconcilable with the other findings and with valid theories of law. (*Tri-Delta, supra*, 80 Cal.App.3d at p. 759.) The special verdict on concealment is taken out of context. It relates to plaintiffs' alternative fraud theory premised on concealment, which the jury rejected. The jury found that defendant intentionally failed to disclose an important fact that plaintiffs did not know and could not reasonably have discovered. No doubt, that important fact was that Hernandez's pending application for transfer of the license was a problem if not withdrawn.

Despite this concealment, there was no fraud based on concealment because the jury found that there was not substantial evidence defendant intended to deceive plaintiffs when he failed to disclose this fact. Defendant believed Hernandez's application for the license would not be a problem because defendant intended immediately to clear up the matter and transfer the license to plaintiffs. The special verdict findings on concealment were thus not in any way inconsistent with the other special verdict findings or theories of law.

Likewise the special findings on making a false promise are not inconsistent or irreconcilable with the other special verdict findings. The jury found that defendant made a promise that was important to the transaction and intended to perform it. This is entirely consistent with jury findings that defendant promised to transfer the liquor license to plaintiffs and that plaintiffs did not have to pay rent until this occurred. Defendant intended to keep this promise but was unable to transfer the license because of plaintiffs' noncompletion of all the ABC requirements for transfer.

Finally, with regard to the special verdict findings regarding defamation damages, there is no inconsistency in the findings. Defendant argues the findings are inconsistent because the jury found that defendant made an unspecified false statement, whereas the record established that the alleged false statement consisted of defendant stating the liquor license was available for transfer, and that statement was true.

This argument has no merit. The special findings concerning defamation damages concern defendant's statements to third parties that plaintiffs would soon be evicted and plaintiffs would not honor contracts with their customers. The defamation claim had nothing to do with defendant's statement to plaintiffs concerning the availability of the liquor license. Apparently the jury did not award actual or assumed damages for defamation because the jury concluded plaintiffs failed to prove defendant's statements constituted a substantial factor in causing plaintiffs actual harm. The jury also found plaintiffs failed to prove defendant knew his statements were false or seriously doubted the statements were true.

We conclude the jury's special verdict findings can be reconciled in accordance with valid theories of contract, fraud, and defamation law.

7. Juror Deliberations

Defendant contends the trial court ruled improperly concerning jury redeliberations, polling the jury, and entering the special verdict on liability. Defendant claims the jurors were confused during deliberations and relied on an improper system of cumulative tallying. This resulted in inconsistent, inaccurate verdicts that are reversible per se.

After receiving the jury's verdict, the trial court polled the jury as to the special findings on liability. Because the lengthy, 28-page special verdict addressed numerous causes of action and findings, and the jurors seemed to be having difficulty remembering how they voted on each question, the court gave the jury its verdict tally indicating how the jury voted. One of the jurors explained to the court that after the jury deliberated on each question, the jurors voted and the number of votes in favor and in opposition to each finding was written down.

Out of the presence of the jurors, counsel and the court discussed using the jury's cumulative tally, rather than polling each juror, but defense counsel wanted the jurors polled because the numbers did not correlate with what the jurors had stated. The court therefore told the jury it would resume polling the jurors. One of the jurors asked, what if the jurors could not remember how they had answered a question. Another juror admitted he and someone else had voted differently than their polling responses. Under such circumstances, the trial court decided that under such circumstances the jury would be permitted to return to the jury room and go back over the special verdict to determine how they had voted.

While the jurors were redeliberating, defense counsel moved for a mistrial on the grounds the jury was confused and did not understand the verdict. The court denied the motion, explaining that the court did not believe the jurors were confused. They merely needed to refresh their memory as to how they voted on each question.

Defense counsel also objected on the ground jurors had asked if they could change their votes. Defense counsel argued that this indicated the jurors wanted to deliberate

further and suggested allowing the jury to deliberate again. The court agreed and informed the jurors they could deliberate further and change their answers if they wished. The court also permitted the jury to use their tallies during polling to refresh their memories as to how they had voted.

We conclude the trial court proceeded appropriately in allowing the jurors to redeliberate, review, and change their special verdict findings, and rely on their voting tallies during the final polling of the jury. The record reflects the jurors were not confused as to the content of the special verdict but rather initially had difficulty recalling how they had individually voted as to each question. When this became apparent, the trial court appropriately permitted the jury to redeliberate and during polling rely on notes indicating how they had voted on each question. The trial court did not abuse its discretion in handling the polling and entry of the difficult, lengthy special verdict. There was no miscarriage of justice.

8. Cross-Motions for Sanctions

On December 29, 2008, Jesus Carrasco and Gloria Carrasco filed a motion under California Rules of Court, rule 8.276(a) for sanctions for filing a frivolous appeal and for failure to comply with California Rules of Court. On January 13, 2009, defendant Steve Tseheridis filed opposition to plaintiffs' motion and a counter-motion for sanctions against plaintiffs and their attorney for filing a frivolous motion for sanctions

“When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just.” (Code Civ. Proc., § 907.) California Rules of Court, rule 8.276(a)(1) provides that a Court of

Appeal may impose sanctions for “[t]aking a frivolous appeal or appealing solely to cause delay.” An appeal may be deemed frivolous because it was undertaken for an improper purpose or because any reasonable attorney would find it devoid of merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649 (*Flaherty*).) “[A]n appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]” (*Id.* at p. 650.)

Plaintiffs argue that defendant’s appeal was frivolous because it was meritless and taken for an improper purpose, such as harassment or delay. *Flaherty* cautions, however, that when evaluating whether an appeal is frivolous, we must be careful to “avoid a serious chilling effect on the assertion of litigants’ rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of fear of reprisals.” (*Flaherty, supra*, 31 Cal.3d at p. 650.) Because the borderline between a frivolous appeal and an appeal that simply has no merit is vague, this “punishment should be used most sparingly to deter only the most egregious conduct.” (*Id.* at pp. 650-651.)

While we reject defendant's contentions on appeal, we cannot conclude that his appeal was frivolous; and we therefore will deny plaintiffs' motion for sanctions. (See *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1119.) We also deny defendant's counter-motion for sanctions as meritless.

9. Disposition

The judgment is affirmed. Plaintiffs' and defendant's counter-motions for sanctions on appeal are denied. Plaintiffs Jesus Carrasco and Gloria Carrasco are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/King
J.